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IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. - ALABAMA
and GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI* CURIAE[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

TLPJ believes that arbitration, knowingly agreed to and fairly structured, can be a valuable mechanism for resolving appropriate legal disputes. In the past decade, however, an increasing number of corporations have attempted to cap their liability and limit their victims' rights by forcing their customers, employees, and vendors to participate in arbitration systems that are so unfair that most reasonable people simply will not pursue their claims. In response to these developments, three years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat such abuses. Through this project, our research has revealed that individuals are frequently deterred from taking part in arbitration by the growing and prohibitive costs charged in many arbitration systems. In some cases, our clients and others were directed to pay arbitration fees that actually exceeded the amount of money at issue in the disputes. We submit this brief to bring these facts to this Court's attention – and to review their implications for this Court's approach to arbitration.

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici* curiae made any monetary contribution to its preparation or submission.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 attorneys who represent employees in labor, employment and civil rights disputes. NELA is one of the largest organizations in the United States whose members counsel, and litigate on behalf of, employees regarding claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on precedent-setting employment law and civil rights issues. Recent cases before this Court and other courts include: *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); and *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998).

NELA members have represented, and continue to represent, tens of thousands of victims of employment discrimination, in federal and state courts. In a considerable number of these cases, employers have attempted to require these cases to be resolved through mandatory arbitration processes. The clients of NELA members will be significantly harmed, as will the public, if employers who violate the nation's civil rights laws are permitted to require–as a condition of employment–that employees submit to arbitration, especially when these arbitration proceedings require considerably more money to initiate and fully resolve than proceedings before federal and state courts.

The Association of Trial Lawyers of America ("ATLA") is a national voluntary bar association of approximately 50,000 attorneys practicing in every state. ATLA members primarily represent plaintiffs in personal injury, civil rights, consumer rights and employment discrimination cases. ATLA is concerned that arbitration is being abused, through prohibitive costs and other practices, to

effectively deprive many Americans of their Seventh Amendment right to a jury trial and the remedies to which they are entitled under the law.

SUMMARY OF ARGUMENT

The Court of Appeals properly declined to compel arbitration in this case because the peculiar arbitration clause at issue here included no rules or other protection ensuring that consumer plaintiffs would not be required to pay prohibitive costs. Building upon a line of recent cases from other federal courts and a number of state courts, the Court of Appeals correctly reasoned that complete uncertainty on the central issue of the costs and fees of pursuing a claim made it likely that many consumers would be deterred from pursuing their statutory rights under the Truth in Lending Act ("TILA").

Defendant tries to portray the Court of Appeals as hostile to arbitration, because it concluded that many consumers would be reluctant to initiate arbitration in a system where they had no idea what they might be charged. It insists that arbitration is cheaper than litigation and that neither courts nor consumers should, therefore, be fearful of an arbitration provision that offers no protection against excessive costs. This argument has some surface appeal and might make sense if the Court of Appeals' ruling had taken place in a vacuum. In fact, however, there is substantial evidence in the public record that corporations are increasingly adopting arbitration provisions and procedures that require individuals to pay prohibitive costs and fees as a condition of pursuing their claims in arbitration. This brief will cite a wide variety of authorities illustrating that, again and again across the country, individuals raising claims against companies have been required to pay thousands (or in some cases, tens of thousands) of dollars to private arbitrators

for adjudication services that would have been available in the public courts for a nominal filing fee. And in far too many cases, the threat of such fees has been enough to deter individuals from pursuing their claims in arbitration. Viewed against this factual backdrop, the Court of Appeals' factual analysis was eminently reasonable. In a country where arbitration fees have frequently been prohibitive, and sometimes ruinous, many consumers would naturally be reluctant to "sign a blank check" and bring their claims in an arbitration proceeding which had no rules about or limitations on its cost.

Defendant's attack on the Court of Appeals' legal analysis is equally lacking in merit. Contrary to defendant's and its *amici*'s suggestion, this Court does not (and should not) always favor arbitration without qualification in all circumstances. There is nothing in this Court's jurisprudence that bars a lower court from refusing to enforce an arbitration clause that threatens individuals with the possibility of prohibitive costs. Instead, this Court has made clear that the lower courts should enforce arbitration clauses only when those clauses provide individuals with a forum where they have a meaningful opportunity to exercise their statutory rights. In more than a dozen recent cases, federal and state courts have applied this Court's teachings by refusing to enforce arbitration clauses that would deprive individuals of their statutory remedies. Lower courts have refused to enforce arbitration clauses that stripped individuals of statutory rights on their face, and they have refused to enforce arbitration clauses that by operation would deter persons from bringing statutory claims. The Court of Appeals' decision fits neatly in with these cases.

Defendant would like to see this Court put an end to this line of cases. It would like to see this Court end the current distinction between arbitration clauses that offer individuals a meaningful forum to pursue their claims (which are currently legal) and arbitration clauses that do not (which could not be enforced under the rationale of the Court of Appeals). This Court should reject that suggestion. It should make clear that arbitration clauses cannot legally operate as exculpatory clauses – and cannot be used to insulate corporations from the meaningful possibility that they might be held liable for breaching consumer protection statutes.

Defendant attempts to salvage its position by arguing that the threat of prohibitive costs would not deter consumers from pursuing arbitration because its arbitration clause suggests that prevailing consumer plaintiffs may recover their arbitral fees. We disagree with that reading, but, even if it is right, that does not matter. Since consumer plaintiffs who do not prevail will still be responsible for potentially large fees, the arbitration provision, at best, imposes a "Loser Pays Rule." Such a rule directly conflicts with established law and TILA.

Finally, defendant argues that consumers should not be allowed to appeal an order compelling arbitration unless they first completed arbitration. Where arbitration is or may be financially prohibitive, however, this Court should recognize that the order compelling arbitration effectively ends the litigation, separate and apart from the statutory provisions at issue here, and thus is appealable under the "death knell" doctrine.

ARGUMENT

I. WHEN PROHIBITIVE ARBITRATION COSTS ARE BEING CHARGED THROUGHOUT THE NATION, THE FAILURE OF AN ARBITRATION CLAUSE TO PROTECT AGAINST THOSE COSTS IS LIKELY TO DETER CONSUMERS FROM PURSUING ARBITRATION.

The arbitration clause imposed by Green Tree upon Ms. Randolph was silent on the subject of costs. It left open the possibility that the consumer would be required to pay half or even all of the arbitrators' fees. The clause placed no limit upon the total fees that an arbitrator might charge, and no limit upon the hourly rate or filing fees that an arbitrator (or worse, possibly a *panel* of arbitrators) might charge. So far as Ms. Randolph or any consumer could tell when looking at Green Tree's arbitration clause, it was entirely possible that the costs could be very high. For Ms. Randolph, the act of filing a claim in arbitration was the equivalent of signing a blank check, with the amount to be filled in later by some unidentified arbitrator. While that might not render the provision unenforceable if arbitrators' costs routinely tracked those of courts, the disturbing truth is that arbitrators throughout the nation often charge such prohibitive costs that no reasonable consumer would resort to arbitration. Under these circumstances, the Court of Appeals acted reasonably in determining that such uncertainty about costs was likely to deter many consumers from pursuing their statutory claims, thus undermining the role of arbitration as just another forum.[2]

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[2]In this case, Green Tree claims that Ms. Randolph has waived her Seventh Amendment right to a jury trial. But how can consent to a waiver (continued...)

While the court system is publicly funded and made available at only nominal costs to taxpayers, most arbitrators are paid on an hourly basis for their work. Just as with any other service that a consumer might purchase, no economically rational consumer would pursue a claim – even if it was a claim arising under some important federal statute, and even if she or he had a strong claim and deserved to win – if she or he believed that the cost of purchasing arbitration services could be prohibitively high. It is basic economics, not "hostility to arbitration," to note that the potential cost of proceeding with arbitration is a central consideration for the vast majority of consumers. Most people pursue their legal claims to obtain financial relief, and if they face the possibility of very large costs – possibly even costs that will exceed their recovery – this will have a huge impact on their willingness to go forward.

The experience of mandatory arbitration in the last five years has generated a large number of cases where arbitration service providers impose significant costs upon individuals. Nearly all arbitration service providers charge both filing fees and hourly arbitrators' fees for conducting hearings, deciding motions, and the like. Some arbitrators also charge fees for travel or room rentals, among other things. Our point is not that *all* mandatory arbitration processes require individuals to pay hefty arbitral fees (they do not), and our point is not that

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[2](...continued)
of a constitutional right be "knowing and intelligent" when the person was required to waive the right in favor of an alternative arbitral forum without knowing whether the forum would cost so much that it would never be used? *Cf. D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (pre-dispute waiver of defenses must be knowing and intelligent); *Erie Telecomm., Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988) (standard that waiver of jury right must be knowing and intelligent applies in civil cases).

mandatory arbitration is always more expensive than litigation in court (it is not). Instead, our point is that mandatory arbitration systems often require individuals to pay costs that are so prohibitive that reasonable consumers would abandon their claims before resorting to arbitration. In light of this fact, the Court of Appeals reasonably concluded that many consumers might be concerned about pursuing arbitration in a setting where the costs were not disclosed.

A host of judicial opinions around the country attest to the fact that many individuals asserting statutory claims against corporations have confronted arbitration fees that amounted to thousands of dollars in settings where these fees would discourage the individuals from pursuing those claims:

- In *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (N.Y. App. 1998), an arbitration clause required individuals to pay an advance fee of $4,000 (which the court noted exceeded the cost of most of the defendant's products), half of which "was nonrefundable even if the consumer prevailed at the arbitration." 676 N.Y.S.2d at 571. The "[c]onsumers would also incur travel expenses disproportionate to the damages sought. . . ." *Id.* The court found "that the excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process." *Id.* at 574.

- In *Myers v. Terminex*, 697 N.E.2d 277, 280-81 (Ohio Ct. Comm. Pleas 1998), the court found that the arbitration clause would require the consumer plaintiff to pay a filing fee of $2,000, and held this to be unconscionable in the context of that case.

- In *Pitchford v. Oakwood Mobile Homes*, 1999 U.S. Dist. LEXIS 20596 at *29-30 (W.D. Va. Dec. 20, 1999), the court noted that the consumer faced fees of more than $1,000. In the context of that case, the court found that these fees "present an insurmountable economic barrier for vindicating plaintiff's rights in the arbitrable forum. . . ." *Id.*

- In *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993), *rev. denied*, 1993 Cal. LEXIS 4322 (Aug. 12, 1993), *cert. denied*, 510 U.S. 1176 (1994), the court found that a borrower would have to pay at least $850 to get a participatory hearing over debts as small as $2,000, and that these fees (along with other procedures) "become oppressive when applied to unsophisticated borrowers of limited means in disputes over small claims." *Id.* at 566-67.

- In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997), the court noted that arbitrators' fees range from $500 to $1,000 per day. The Court of Appeals concluded that it was unacceptable to impose fees of this magnitude upon individuals bringing statutory civil rights claims, as doing so would discourage the individuals from vindicating their statutory rights.[3]

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[3] *Cole*, like several of the cases that follow, involves arbitration in the employment setting rather than the consumer setting. The reasons that much of the available data comes from the employment setting are that (a) there has been far more arbitration in the employment setting than in the consumer setting until the explosive growth in the latter setting of the last several years and (b) since individual consumer claims tend to be for lower dollar figures than most employment claims, far more consumer plaintiffs

(continued...)

- In *Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230, 1235 (10th Cir. 1999), the court refused to compel arbitration where the claimant would be required to pay one-half of the arbitrator's fees – an amount projected to total between $1875 and $5000 – to resolve a discrimination claim against his employer. The court found that the agreement was unenforceable, "plac[ing] Mr. Shankle between the proverbial rock and a hard place – it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." 163 F.3d at 1235.

- In *Paladino v. Avnet Computer Tech, Inc.* 134 F.3d 1054 (11th Cir. 1998), the court noted that the clause at issue would require individuals to pay a filing fee of $2,000, plus an indeterminate sum for the arbitrators' fees. The court found that "costs of this magnitude [are] a legitimate basis for a conclusion that the clause does not comport with statutory policy" enabling persons subjected to workplace discrimination to vindicate their rights. *Id.* at 1062.

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[3](...continued)
have simply abandoned their statutory claims rather than pursue them in arbitration. As one indication that few consumers choose to avail themselves of arbitration, recent statistics indicate that while First USA, a large credit card company, has initiated more than 50,000 arbitration actions against its cardholders before the National Arbitration Forum, the cardholders themselves have initiated only four (4) arbitration actions against the company. *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-sided*, Wash. Post, Mar. 1, 2000.

- In *Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999), "the Arbitration Policy require[d] Plaintiff to pay one-half of the arbitrator's fee, the court reporter's fee, the fee for the arbitrator's copy of the transcript, and facility costs." In light of the expected size of these fees and the plaintiff's limited resources, the court found that "the prohibitive cost substantially limits the use of the arbitral forum." *Id.*

- In *Hornstein v. Mortgage Market, Inc.*, 1999 U.S. Dist. LEXIS 21463 (D. Or. Jan. 7, 1999), a clause required plaintiffs in a wage and hour claim case to pay half of all arbitration fees to pursue their claims. The court found that this provision "unabashedly violates the letter and spirit of the [Fair Labor Standards Act] and Oregon wage and hour laws by denying the basic right of participation in the adjudicatory process." *Id.* at *9.

- In *Matter of Arbitration Between Teleserve Sys., Inc. and MCI Telecomm. Corp.*, 659 N.Y.S.2d 659, 660, 664 (N.Y. App. 1997), the court noted that the arbitration filing fee alone for the claimant in an antitrust dispute would amount to more than $200,000. The court held that this fee was "patently excessive." *Id.* at 664. "The practical effect of such an oppressive and burdensome fee is to bar arbitration of" the plaintiff's claims.

The reported cases constitute just the tip of the iceberg on this point. *Amici* have lodged with the Court documents from a handful of additional cases illustrating the problem of prohibitive fees in greater detail:

- In *Warner v. Von Buettner Ristow*, a woman alleging sexual harassment was required to pay $18,260 to the American Arbitration Association ("AAA") to arbitrate her claim. TLPJ/ATLA/NELA Lodging at 1-4. When she did not prevail on the claim, the arbitrator assessed Ms. Warner $207,271.00. Lodging at 3-4.

- In *Sharpton v. Central Reserve Life Ins. Co.*, a woman claiming that her health insurer should cover a transplant was directed to pay each member of a panel of arbitrators $900 a day for hearings, and $135 per hour for study time. Lodging at 5. One possible explanation for the high rates was that every one of the arbitrators suggested by AAA for the case was an employee of or an attorney for an insurance company. Lodging at 6.

- In *Mehler v. Terminex*, a husband and wife claiming personal injuries due to toxic contamination were asked to pay $7,000 for filing fees alone to arbitrate their claim after Terminex instituted arbitration proceedings against them. Lodging at 8.

- In *Crandall v. Century Manufactured Mobile Homes, Inc.*, a husband and wife bringing warranty and state consumer protection claims in a case involving a defective mobile home were instructed to pay a $5,000 initial retainer fee (their share of a total initial fee of $20,000), and told that the arbitrator "would not be surprised" if his eventual total fee was even higher. Lodging at 9.

- In *Morse v. Don Fox Mobile Home Sales*, consumers raising warranty and state consumer protection claims

relating to a defective mobile home were given an "interim bill" by the arbitrator for $4,957.50, and were instructed to pay half this sum. Lodging at 10-12.

- Individuals with employment claims in New York Stock Exchange arbitrations regularly face very large forum fees. In *Wolfe v. Schwab*, for example, the claimant was assessed $41,400 in forum fees, Lodging at 14; in *Krasner v. Shearson Lehman Bros., Inc.*, the claimant was assessed $24,500 in forum fees, Lodging at 15; in *Vickers v. The First Boston Corp.*, the claimant was assessed $9,150 in forum fees, Lodging at 16; and in *Tortora v. Merrill Lynch Pierce Fenner & Smith*, the claimant was assessed $6,600 in fees. Lodging at 13.

A number of academic and legal commentators have also reported that arbitration service providers frequently charge very high fees to individuals as a condition of pursuing their claims. *See* Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293, 306-307 (1999):

> I . . . think that some courts still subscribe to the fond, but misguided, view that employment arbitration is invariably quick and cheap. The simple truth is it just ain't necessarily so. When we researched the subject in connection with the appeal in Cole v. Burns, we found that . . . JAMS/Endispute arbitrators charged an average of $400 per hour, but fees of $500 or $600 per hour were not uncommon. CPR Institute for Dispute Resolution estimated arbitrators' fees of $250 - $350 per hour and 15-40 hours of arbitrator time in a typical employment case, for

> total arbitrators' fees of $3750 to $14,000 in an 'average' case. . . . I was recently told of a case in which a private mediator billed the parties $25,000 *for one day of work*!

See also Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 S. Ct. Rev. 331, 384 (1996) ("The AAA charges an administrative fee for its services that is generally higher than court filing fees, and . . . most [arbitrators] must be paid by the parties, sometimes at handsome hourly rates."); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 Mich. B.J. 302, 303 (1999) ("Courts are subsidized; arbitration forums are not. Filing fees for commercial cases [which include cases brought by consumers] at the [AAA] start at $500, for claims under $10,000, and go up from there. Additional administrative fees are charged for each day of arbitration. The arbitrators themselves charge an hourly fee. . . . The AAA may require a party to deposit in advance sums of money to cover anticipated arbitrators' fees or administrative costs. Failure to pay fees and charges in full may result in suspension or termination of the arbitration proceeding.").[4]

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[4] *Accord* Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?*, 53 Disp. Resol. J. 40, 47-48 (1998) ("[S]haring the arbitrator's fees and expenses might prove an insurmountable barrier for the putative grievant. Even a relatively simple case can cost several thousand dollars; a complicated case could easily run several times that. Few grievants can afford that much of a commitment, even if an arbitrator could order reimbursement in the event the grievant prevails."); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 Fordham Urb. L.J. 311, 331-33 (1999) (citation omitted) ("[W]ith arbitration filing and administration fees totaling thousands of dollars per case, and hourly rates ranging from $200-$700, arbitration can be extremely expensive for plaintiffs, especially in

(continued...)

The national news media have also widely reported the phenomenon of prohibitive arbitration fees. *See The Arbitration Trap: How Consumers Pay for 'Low Cost' Justice*, Consumer Reports, August 1999, at 64 ("Binding arbitration is touted as a low-cost way to get justice, but it can end up costlier than taking a case to court. Consumers may have to pay for the arbitrator's time, which can run $300 or more per hour – effectively ruling out arbitration's usefulness in cases involving small claims"); Mark Curriden, *Arbitration Is Weapon Against Liability*, Dallas Morning News, May 12, 2000 ("Mr. Wheeler [a truck driver with a badly damaged house]'s only legal remedy is to complain to a private arbitrator belonging to an association chosen by the developer. That would cost him a $3,000 advance fee, and he wouldn't be allowed to appeal a loss. So he has given up.").[5]

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[4](...continued)
more complex cases, and particularly in light of the fact that plaintiffs are almost always required to pay at least half of the costs. As such, an out-of-work plaintiff facing a 'deep pocket' [defendant] may be severely disadvantaged.").

[5]*See also* Christine Dugas, *Arbitration Might Be Only Choice*, USA Today, August 27, 1999 ("Although arbitration is supposed to be inexpensive, that's not always the case. For example, JAMS/Endispute requires each party to pay a $250 administrative fee. You will also pay an hourly fee for the arbitrator. Fees can quickly exceed the amount of small credit card claim."); Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us'*, Washington Post, May 22, 1999 ("[T]he cost of arbitration can sometimes be significantly higher than court fees, making it financially impossible for some consumers to seek relief."); Jenny Strasburg, *Proceeding Under Fire*, S. F. Examiner, April 30, 2000 (woman alleging that a physician removed her medical gown without her permission and poked her body with a safety pin charged 50% of American Arbitration Association's hearing fee of $8,600).

The foregoing demonstrates beyond any serious doubt that a large number of individuals have encountered prohibitive fees as a condition of pursuing their claims in arbitration. In light of this reality and against this backdrop, the Court of Appeals was plainly right in concluding that reasonable consumers would fear that an uncertain arbitration system would be very expensive. When individuals across America have been repeatedly hit with fees of thousands of dollars to go to arbitration, the Court of Appeals had every reason to hold that consumers with very small claims (like Ms. Randolph) would be deterred from exercising their statutory rights by an arbitration clause (like Green Tree's) that set forth no rules – and thus no limits – on arbitral fees.

II. THE COURT OF APPEALS' REFUSAL TO IMPOSE ARBITRATION WHEN PROHIBITIVE COSTS COULD RENDER ARBITRATION A MEANINGLESS ALTERNATIVE WAS FULLY CONSISTENT WITH THE RULINGS OF THIS COURT AND NUMEROUS LOWER COURTS APPLYING THIS COURT'S REASONING.

To hear defendant and its *amici* tell it, this Court has adopted a policy favoring arbitration that is so robust as to be unqualified. Green Tree and its allies suggest that courts should embrace virtually all arbitration systems with little consideration of how or whether those systems will actually work. These advocates articulate little or no role for courts in policing particularly unfair arbitration systems, and suggest that in this case, it was impermissible "hostility" towards arbitration for the Court of Appeals to undertake such a role.

In constructing this argument, defendant and its *amici* leave untold much of the history of how federal and state courts

have reacted to the developments in the marketplace since this Court last decided a consumer arbitration case in *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995). Before *Allied-Bruce*, mandatory predispute binding arbitration was principally confined to transactions and relationships between commercial entities or the collective bargaining context. In recent years, however, these clauses have been increasingly imposed upon individual consumers in standard form contracts by a host of businesses.[6] As this landscape has changed, literally dozens of federal and state courts have undertaken to ensure that the arbitration systems imposed by corporations do not abuse the rights of individuals. Far from being a pariah in the law, the Court of Appeals' decision here fits comfortably into a broad trend that has developed over the last five years.

It should be noted that most of these judicial policing efforts involve the application of noncontroversial legal principles. This Court has instructed, for example, that courts should not enforce arbitration clauses that are unconscionable or otherwise subject to fundamental contract defenses under state law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (citation omitted) ("[C]ourts should remain attuned to well-supported claims that the agreement to arbitrate

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[6] *See* Caroline E. Mayer, *Hidden in Fine Print: You Can't Sue Us*, Washington Post, May 22, 1999 at A1 ("American Express is just one of the growing number of companies – among them banks, computer makers, insurance firms and car dealers – that are rewriting the fine print of their contracts and sales agreements to require that consumers agree, in advance, to give up their right to sue and submit any disagreements to arbitrators.") Some business advocates have explicitly endorsed this spread as a means for businesses to cap and reduce their liabilities. Alan Kaplinsky, *Excuse Me, But Who's The Predator: Banks Can Use Arbitration Clauses As A Defense*, Bus. Law. 24, 25-26 (May/June 1998) (describing arbitration as a "defense" for banks against consumer claims, and as "a powerful deterrent to class action lawsuits").

resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'."). A host of courts around the country have, therefore, refused to enforce arbitration clauses that were found to be unconscionable.[7] Similarly, many courts have refused to enforce arbitration clauses where there was evidence that the arbitrator was likely to be biased.[8]

And, perhaps most relevant to this case, numerous courts have held that individuals may not be forced into

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[7] *See, e.g., Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230 (10th Cir. 1999); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000), *appeal filed* (6th Cir. 2000); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Ct. App. 1999); *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999); *In the Matter of Arbitration Between Teleserve, Inc. and MCI Telecomm. Corp.*, 659 N.Y.S.2d 659 (N.Y. App. 1997); *Williams v. Aetna Co.*, 700 N.E.2d 859 (Ohio 1998), *cert. denied*, 526 U.S. 1051 (1999); *Turner Bros. Trucking Co.*, 8 S.W.3d 370 (Tex. Civ. App. 1999), *writ denied* (May 11, 2000); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Arnold v. United Companies Lending Co.*, 511 S.E.2d 854 (W. Va. 1998).

[8] *See Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (refusing to compel arbitration where an employer's arbitration rules were "crafted to ensure a biased decisionmaker"); *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986) (arbitrator not independent where she or he was to be picked by and paid by union); *Cheng-Canindan v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867 (Ct. App. 1996) (procedure dominated by an employer would not be compelled); *Ditto v. Re/Max Preferred Properties, Inc.*, 861 P.2d 1000 (Okla. Civ. App. 1993) (where only one party had a voice in selection of arbitrator, clause would not be enforced); *In the Matter of Arbitration Between Cross & Brown Co. and Nelson*, 167 N.Y.S.2d 573, 575 (App. Div. 1957) (not enforcing an arbitration agreement that appointed the employer's Board of Directors as arbitrator); *Board of Educ. v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 443 (W. Va. 1977) (finding exclusive control over selection of arbitrators by one party inherently inequitable).

arbitration if it does not offer them the same remedies that would be available in court. *See, e.g., Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997), and cases discussed below. This body of law stems directly from the teachings of this Court, and has been applied repeatedly both to clauses that seek to re-write underlying substantive laws (e.g., arbitration clauses that prevent claimants from receiving remedies available under civil rights or consumer protection laws) and to arbitration clauses that rig the playing field so that individuals will be deterred from pursuing their claims (e.g., arbitration clauses that require individuals to pay excessive fees to have their claims heard). The Court of Appeals' decision here fits comfortably into this long line of cases.

As noted above, the many cases in this line spring from this Court's own teachings. In *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 632 (1985), this Court instructed that an arbitration clause can be set aside if "proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." In *Gilmer*, this Court conditioned its approval of arbitration on the requirement that arbitration offers remedies that are equal to those available in court. *See Gilmer,* 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). This Court did not say that the plaintiff in *Gilmer* could contractually waive his statutory claims, or that it was acceptable for the arbitration scheme at issue to effectively block the plaintiff's claims. Instead, this Court enforced the arbitration clause precisely *because* it concluded that arbitration offered the plaintiff a meaningful remedy.

Lower courts charged with applying these general principles have refined them to derive the following rule: arbitration must offer "all of the types of relief that would otherwise be available in court" before a court will compel arbitration. *Cole*, 105 F.3d at 1482. As the U.S. Court of Appeals for the Sixth Circuit held two months ago:

> [E]ven if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions.

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 313 (6th Cir. 2000). *See also Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J. concurring, for a majority of the court) (the arbitrability of claims under Title VII "rests on the assumption that the arbitration clause permits relief equivalent to court remedies. . . . When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable.") (citing *Cole*); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (invalidating an arbitration agreement that required a claimant to forfeit rights and benefits guaranteed by the Petroleum Marketing Practices Act, including imposing a limit on the recovery of punitive damages and attorneys' fees and a one-

year statute of limitations).[9] Taken together, these cases stand for a simple and powerful proposition: courts should not compel mandatory arbitration unless the arbitrator has the power to provide a claimant with all of the relief to which he or she is entitled.

This line of cases gave rise to a necessary corollary: just as courts have refused to enforce arbitration clauses that explicitly eliminated the remedies available to individuals, courts have also refused to enforce arbitration clauses that rigged procedural rules in such a way as to effectively deny individuals meaningful remedies. The most numerous and important of these cases have held that arbitration clauses may not require plaintiffs to pay fees that might discourage or prevent a party from bringing a claim. This conclusion was reached in each of the cases cited in Part I, *supra (Cole, Paladino, Shankle,* etc.). *See also Giles v. New York*, 41 F. Supp. 2d 308, 313 (S.D.N.Y. 1999) ("[M]andatory arbitration

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[9] *See also Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 697 (7th Cir. 1984) (holding that arbitration offended due process where arbitrator could not award full common law damages nor prevent harm to constructively discharged plaintiff before it occurred); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 256 (S.D.N.Y. 1998) ("[A]rbitration must allow remedies central to the statutory scheme . . . [and] sufficient to satisfy statutory purposes."); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (voiding provision of arbitration agreement that disallowed attorneys' fees to prevailing plaintiff in Title VII claim after concluding that "contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 185 (D. Mass. 1997) (allowing plaintiff to pursue judicial claim under the Americans with Disabilities Act where arbitration agreement did not authorize arbitrator to provide remedy of 'reasonable accommodation' which plaintiff was entitled to pursue under the Act).

provision featuring fee-splitting is unenforceable because it deprives individuals of their required 'reasonable right of access to neutral forum.'") (citing *Cole v. Burns*); *Baron v. Best Buy Co., Inc.*, 79 F. Supp. 2d 1350, 1355 (S.D. Fla. 1999) ("[A]rbitration agreement which limits or precludes statutory remedies, or which possibly makes an individual responsible for arbitration fees and costs, is unenforceable.") *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255-56 ("[A]rbitration agreement cannot impose financial burdens on plaintiff access to the arbitral forum."); *Rembert v. Ryan's Family Steak Houses*, 596 N.W. 2d 208, 255, 288 (1999) (one of the "baseline fundamentals" for a fair arbitration process is that it "does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum").[10]

Defendant suggests that this Court has so favored arbitration that the clause should be enforced here even if the

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[10]While each of the above courts concluded that it is not acceptable for arbitration clauses to require individuals to pay prohibitive fees to pursue claims in arbitration, several of the courts still required the individuals to take their claims to arbitration, but effectively re-wrote the contract so that the corporate defendant was required to pay these fees. *See, e.g., Cole, Jones*; and *Teleserve*. We believe, however, that the more appropriate judicial response is to strike the arbitration clause. This Court has instructed that the "primary purpose" of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr., Univ.*, 489 U.S. 468, 479 (1989). If a private agreement to arbitrate cannot be enforced according to its terms, the courts should refuse to enforce it. They should not draft and enforce a new "agreement" to arbitrate of their own making. Where a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of a court to supply the legal acumen to re-write the contract to find a legal way for the drafter to enjoy the otherwise-unobtainable results it sought.

Court of Appeals was right in concluding that defendant's arbitration clause's failure to limit arbitration fees would deter plaintiff from pursuing her statutory claims in arbitration. In effect, defendant asks this Court to do far more than reverse the Court of Appeals in this case. In reality, defendant asks this Court to back away from its insistence that arbitration be "just another forum," to disapprove of a host of recent cases where courts have given concrete meaning to this Court's instruction in *Mitsubishi* and *Gilmer*. This Court should reject defendant's request, and make clear that arbitration clauses will only be enforced where they do not explicitly or effectively eliminate statutory remedies for individuals.[11]

III. THE POSSIBILITY THAT PREVAILING PLAINTIFFS MAY RECOVER THEIR ARBITRATION FEES DOES NOT SAVE DEFENDANT'S ARBITRATION CLAUSE, AS THIS "LOSER PAYS RULE" UNDERMINES TILA AND DETERS PLAINTIFFS FROM PURSUING THEIR CLAIMS THROUGH ARBITRATION.

While the arbitration clause in this case is silent on the subject of costs, *see* Part I *supra*, Green Tree nevertheless contends that the arbitration clause adequately protects against the possibility of enormous arbitral costs by implicitly requiring the arbitrator to order that the defendant reimburse a prevailing

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[11] If this Court chooses to embrace the proposition that arbitration clauses may not impose fees large enough to deter persons from pursuing statutory claims, but agrees with the argument of defendant that the Court of Appeals did not have a sufficient factual basis to conclude that this clause would have such a deterrent effect, we respectfully suggest that this Court should remand the case to expand the factual record, rather than (as defendant suggests) order that the arbitration clause be enforced.

consumer for any arbitration fees or costs. *E.g.*, Petitioner's Brief at 3. This asserted protection amounts at best, to a "Loser Pays Rule." In other words, under defendant's reading of its clause, only a consumer who *prevails* on a TILA claim would owe no costs or fees to the arbitrator. Any consumer who does *not* prevail would, however, apparently still be subject to whatever fees an arbitrator might choose to impose. (As established above, the consumer could easily face filing fees and arbitrators' hourly fees amounting to thousands of dollars.)

Defendant's reading of this clause turns it into a back-door tort reform measure, a "Loser Pays Rule" that substantially shifts the law from where it stands under TILA. Like many consumer protection statutes, TILA provides that a prevailing plaintiff shall recover her or his attorneys' fees, but a defendant shall only recover attorneys' fees if the plaintiffs' claims were frivolous.[12] Fees may only be awarded against losing plaintiffs in extreme cases, not, as with defendants' arbitration clause, against any plaintiff who happens ultimately to lose her or his case:

> Unlike prevailing plaintiffs who are ordinarily entitled to fees in civil rights cases, prevailing defendants may not recover fees unless they can show that the plaintiff's action was frivolous, unreasonable, or without foundation, or when

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[12]TILA, like most statutes providing causes of action for individuals against corporations and institutional defendants, provides for attorneys' fees only to prevailing plaintiffs (and not prevailing defendants). *See* Alba Conte, 1 *Attorney Fee Awards* § 5.01 at 266 n. 1 (1993) (statutes providing attorneys' fees only to prevailing plaintiffs include TILA, the Consumer Credit Protection Act, the Fair Debt Collection Practices Act, the Consumer Product Safety Act, ERISA, the Clayton Act, and the Equal Credit Opportunity Act).

> plaintiff continues to litigate a case after the lack of foundation becomes evident. Courts generally have concluded that an award of attorneys' fees against a losing plaintiff is an extreme sanction and must be limited to truly egregious cases of misconduct.

Conte, § 1.05 at 9 (footnotes omitted).

This Court has enunciated the simple and sensible reason for this rule: requiring individuals to pay a defendant's attorneys' fees merely because they do not prevail would discourage plaintiffs from seeking protection of the law. "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). The *Christiansburg* logic applies fully to consumer protection statutes like TILA. *See Postow v. OBA Federal S&L Ass'n*, 627 F.2d 1370, 1387-88 (D.C. Cir. 1980). The "loser pays rule" is not a minor procedural rule, a mere part of "another forum." Such a rule would deter most consumers from pursuing any relief no matter how strong their claims.

IV. WHERE AN ARBITRATION CLAUSE POSING THE THREAT OF PROHIBITIVE COSTS EFFECTIVELY BARS INDIVIDUALS FROM PURSUING THEIR CLAIMS, REQUIRING AN INDIVIDUAL TO NONETHELESS PURSUE ARBITRATION AS A PRECONDITION OF FILING AN APPEAL OF AN ORDER COMPELLING ARBITRATION WILL DENY ALL APPELLATE REVIEW.

For all of the reasons set forth above, the Court of Appeals correctly concluded that Green Tree's arbitration clause is unenforceable. Concerned that this Court will reach the same conclusion, defendant insists that the district court's decision enforcing arbitration should not be appealable – so the validity of Green Tree's arbitration clause cannot be considered. As we have demonstrated above, many individuals have been deterred and often barred from pursuing their claims in arbitration by the threat or the immediate reality of prohibitive arbitration fees. Yet defendant contends that, even if a trial court faced with such a case were to err and compel arbitration despite the meaninglessness of the arbitral remedy, the incorrect trial court order simply could not be appealed.

It is easy to see why Green Tree and its *amici* would desire this result: it would render pro-defendant district court opinions unreviewable. Individual plaintiffs hit with an erroneous order compelling arbitration would face a Catch-22: you can't appeal unless you arbitrate first, and you can't arbitrate first because you may or will face prohibitive costs. Under this scenario, district court orders compelling arbitration could not be appealed because plaintiffs could not risk the ruinous costs imposed by proceeding to arbitration. Parties supporting forced arbitration will naturally favor such a result,

but it is flatly inconsistent with core doctrines of law relating to appealability.

We realize that statutory interpretation issues could be relevant here. We do not address them because they will be amply addressed by the parties. We write separately to suggest that, apart from the language of the Federal Arbitration Act, there is another doctrine available to resolve this issue in favor of the consumer plaintiff here. Since few if any consumers would dare to face the potentially unlimited arbitral fees threatened by the silent arbitration clause here, an order compelling arbitration effectively sounds the "death knell" of the plaintiffs' case. As a result, the order is appealable under the well-established "death knell" doctrine.

There is a rich history in the federal courts of allowing immediate appeal when an court order has the same practical effect of a dismissal. This doctrine of appealability has been appropriately named the "death knell" doctrine because it arises whenever an order that seems interlocutory actually ends the plaintiff's case. "[W]hen a plaintiff's action is effectively dead, the order which killed it must be viewed as final." *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). The rationale behind this rule is that just as *actual* dismissal is reviewable for judicial error or misapplication of the law, so should *practical* dismissal be reviewable. Otherwise, the plaintiff will lose the right to a full and just review of her claim. *McKnight,* 667 F.2d at 479 ("[An] order is held to be appealable when the effect of the denial of an immediate appeal . . . would effectively deny the litigants their day in court.").

Courts have invoked the death knell doctrine in a number of situations where, as here, an interlocutory order effectively cut off a plaintiff's ability to pursue her claim. In

one line of cases, courts have allowed immediate appeal from stay orders because the plaintiff's particular circumstances made a temporary stay effectively permanent. In *McKnight v. Blanchard*, 667 F.2d at 479, for instance, the court held that the plaintiff prisoner could appeal an order which stayed his action for injunctive relief until he was released from prison. Because the plaintiff would probably not get out of prison for seven or more years, and because his witnesses might not be available at that point, the court said that the stay order sounded the death knell for his claim. *See also Muhammad v. Baltimore City Jail*, 849 F.2d 107, 110 (4th Cir. 1988) (allowing an appeal from an order granting a stay of a prisoner's civil rights, pending his release from prison; while finality is usually only satisfied when an order "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," an order is appealable that, "though it does not technically end his action, does so in practical effect.").

Courts have also allowed immediate appeal when an order would place the plaintiff in a situation where further action on her claim, if not impossible, is probably futile. *See Culbertson v. Sec'y of Health and Hum. Servs.*, 859 F.2d 319, 333 (4th Cir. 1988) ("Certain judicial orders may well carry a 'death-knell' or 'practical finality' quality. In such circumstances, it is entirely appropriate for a reviewing court to treat as final an order that 'effectively kills' a party's action."); *Hines v. D'Artois*, 531 F.2d 726, 740 (5th Cir. 1976) (holding that an order remanding plaintiff's case to the EEOC, when the EEOC takes years to process claims, would give rise to a state of "suspended animation" akin to "effective death" of the claim.). This situation has also arisen in the context of forum transfers. *See, e.g., U.S. v. Berkowitz*, 328 F.2d 358, 360 (3d Cir. 1964) (allowing appeal from an order denying transfer

from a court with no jurisdiction over the defendant, because the order would "effectively terminate the lawsuit."). [13]

This Court should apply the same logic and allow appeal in the instant case, where overwhelming evidence on the excessive cost of arbitration – especially where costs are not specified in the arbitration clause – supports the probability that the motion to compel arbitration sounds a ringing death knell for the plaintiff's entire claim. If the arbitration forum is not truly available, appellate review should be.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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[13] At least two circuits and a host of district courts have held that a party will suffer per se irreparable harm if it is forced to arbitrate when it has not agreed to do so. *Cf. McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997); *Painewebber, Inc. v. Hartmann*, 921 F.2d 507, 514-15 (3d Cir. 1990); *GTFM, LLC, v. TKN Sales, Inc.*, 2000 U.S. Dist. LEXIS 4488 at *6 (S.D.N.Y. April 10, 2000) ("[A] party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so."); *SEMCO, LLC v. Ellicott Mach. Corp.*, 1999 U.S. Dist. LEXIS 10710 at *8 (E.D. La. July 9, 1999) ("Courts have recognized that the wrongful enforcement of an arbitration clause in and of itself constitutes irreparable harm."); *Chicago Sch. Reform Bd. of Trustees v. Diversified Pharm. Servs., Inc.*, 40 F. Supp. 2d 987 (N.D. Ill. 1999).

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